

28 July 2011

The Enterprise Agreement Approval Process

In order for a proposed enterprise agreement to come into operation and have legal force, it must be approved by Fair Work Australia (**FWA**). The process for having the proposed enterprise agreement approved in accordance with the provisions of the *Fair Work Act 2009* (**the Act**) is outlined below.

Summary

1. The approval process for the proposed enterprise agreement can be broken down into 4 steps:
 - i. Initiating bargaining (by issuing a Notice of Employee Representational Rights to employees);
 - ii. Negotiating the content of the proposed enterprise agreement;
 - iii. Asking employees to approve the proposed enterprise agreement; and
 - iv. Lodging the proposed enterprise agreement with FWA for final approval.
2. The agreement-making process proper can be initiated by either an employer, a union, or employees. Once the employer agrees to begin, or initiates, bargaining, the first of the legislative obligations arises.
3. That obligation is the requirement to notify employees of their rights to representation in the enterprise bargaining process, i.e. their right to appoint someone to represent them in the negotiation process.
4. Following that step, the parties then begin negotiating the actual contents of the proposed enterprise agreement.
5. Once the terms and conditions have been finalised, the proposed enterprise agreement is put to the employees for a 'pre-approval' vote. The proposed enterprise agreement is then 'made' when a majority of the employees *who cast a valid vote* approve the proposed enterprise agreement.
6. Note that the Act does not require that a majority of the employees covered by the proposed enterprise agreement vote in favour, but simply that 50% plus 1 of those who cast a valid vote do so.
7. The proposed enterprise agreement is then submitted to FWA for final approval, following the application of the 'Better Off Overall Test' (BOOT).

Step 1 – Issuing a Notice of Employee Representational Rights to employees

8. Once enterprise bargaining begins, the Act requires that the employer provide to each employee who will be covered by the proposed enterprise agreement, a notice detailing their right to be represented by a bargaining representative in the negotiations.
9. The employer is required to provide that notice to the employee as soon as practicable, or **within 14 days** of the date on which the employer agrees to, or initiates, bargaining for a proposed enterprise agreement.

10. The notice must inform the employee that they may appoint a bargaining representative to represent them in the negotiations for the proposed enterprise agreement, and in matters before FWA in relation to the bargaining process.
11. The notice must also inform an employee that if they are a member of an employee organisation (such as a union or association) and they do not appoint another person as their bargaining representative, then the organisation will be their default bargaining representative.
12. The fact that an employee may have a union as their default bargaining representative does not necessarily mean that the union will seek to be involved in any bargaining. Such a decision will usually heavily depend on the level of union membership at the workplace.

Step 2 – Negotiating the contents of the Agreement

13. Once employees have been provided with a Notice, 'bargaining' can get underway. If a draft agreement has already been prepared, this is the time during which the proposed enterprise agreement should be provided to the employees and any feedback sought as to the contents.
14. While much of the proposed enterprise agreement may, in your view, be non-negotiable, it is important to understand the views of employees in order to be assured that the proposed enterprise agreement is approved by a majority of the employees at the appropriate time.
15. To that end it is important that the employees who are to be covered by the proposed enterprise agreement also understand the approval process, and that the proposed enterprise agreement provides them with some tangible benefits – such as the increase in salaries over the award minimum.
16. While generally it may be unlikely that a union will seek to become involved in discussions regarding the contents of the proposed enterprise agreement, some employees may seek to do so.
17. Of all the new rules that the Act introduced in relation to the enterprise bargaining process, the provisions that have received the most attention have been those dealing with the 'good faith bargaining' obligations imposed on parties involved in enterprise bargaining negotiations. Those provisions require parties to:
 - attend and participate in meetings at reasonable times;
 - disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
 - respond to proposals made by other bargaining representatives for the agreement in a timely manner;
 - give genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
 - refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining;
 - recognise and bargain with the other bargaining representatives for the agreement.
18. The provisions do not require the parties to:
 - make concessions during bargaining for the agreement; or
 - reach agreement on the terms that are to be included in the agreement.

19. Essentially the good faith bargaining provisions simply require the parties to approach the bargaining process in an open and transparent matter. Again, consistent and clear communication with employees regarding the proposed enterprise agreement, and the approval process will satisfy these requirements.
20. While the limits on the provisions will take some time to become clear, we do not think that they place any particularly onerous obligations on employers who are seeking to reach agreement in circumstances where there is either a good relationship with employees, or no specific issues in dispute at the time negotiations commence.

Who do you bargain with?

21. As discussed above, if an employee appoints a union as their bargaining representative, then it is likely that the union will seek to be involved in the negotiation process. However, the level of their involvement often depends on the level of membership amongst the employees of the business. A union will be less likely to want to commit resources to bargaining if they only have a few members that are likely to be covered by the agreement.
22. If a union decides not to get directly involved, then the negotiations will take place with employees directly. This can be a difficult process to manage, and requires some planning prior to the commencement of the negotiation process.
23. We would recommend that the company take the time to consider the best way to form a representative committee of employees who will then act on behalf of their colleagues in negotiations.
24. The first step is to clearly communicate with employees the reasons for embarking on the enterprise bargaining process, the advantages for them and the business (clarity around entitlements, the protections afforded by having a registered agreement, the possibility of having tailored provisions for your employees), and an outline of what the process involves.
25. As discussed, it is important to communicate with staff regularly in order to 'sell' the proposed enterprise agreement. This is a process that we can provide assistance and advice on.

Step 3 – The pre-approval process

26. Before a proposed enterprise agreement can be lodged with FWA for 'official' approval, it must be presented to employees for their approval by way of a vote.
27. Prior to the vote taking place, the employees must be given a copy of the proposed enterprise agreement, and the employer must take all reasonable steps to explain the terms of the proposed enterprise agreement. In explaining the terms of the proposed enterprise agreement an employer must take reasonable steps to ensure that the explanation is provided in an 'appropriate manner' taking into account the particular circumstances of the relevant employees (such as language difficulties or cultural differences).
28. The employees must have access to a copy of the proposed enterprise agreement for **at least 7 clear days** prior to a vote being taken.
29. Once the terms of the proposed enterprise agreement has been explained to the relevant employees, and **at least 21 clear days after** the provision of the Notice to employees, the employer can request that employees approve the proposed enterprise agreement.
30. The approval vote can be held electronically or by ballot (including postal ballots). If a valid majority (50% plus 1 of those employees who cast a valid vote) approve the proposed enterprise agreement, the proposed enterprise agreement is said to have been 'made' according to the provisions of the Act.

31. After the proposed enterprise agreement has been made, a union that was a bargaining representative for the proposed enterprise agreement may give notice to FWA that it wishes to be covered by the proposed enterprise agreement.
32. Being covered by the proposed enterprise agreement means that the union can enforce the proposed enterprise agreement or deal with disputes over the application of the proposed enterprise agreement by using the disputes resolution procedure in the proposed enterprise agreement, rather than by seeking to prosecute breaches in a court.

Step 4 – Approval by FWA

33. Once the proposed enterprise agreement has been approved by the relevant employees, the proposed enterprise agreement is then lodged with FWA for approval.
34. The proposed enterprise agreement must be lodged **within 14 days** of the vote which approved the proposed enterprise agreement.
35. Along with a signed copy of the proposed enterprise agreement, the bargaining representative (usually the employer) must lodge with FWA an application for approval.
36. If certain requirements are then met, FWA must approve the proposed enterprise agreement.
37. The requirements that FWA must be satisfied have been met are:
 - That the agreement has been genuinely agreed to by the employees covered by the proposed enterprise agreement;
 - The terms of the proposed enterprise agreement do not fall below those provided for in the National Employment Standards (**NES**);
 - The proposed enterprise agreement passes the Better Off Overall Test (**the BOOT**).
38. In deciding whether the proposed enterprise agreement has been 'genuinely approved', FWA must be satisfied that all the required steps have been taken prior to the vote.
39. Apart from the requirements above, FWA must also be satisfied that approving the proposed enterprise agreement would not be inconsistent with good faith bargaining, and that it does not contain any prohibited clauses.
40. Finally, FWA must be satisfied that the proposed enterprise agreement passes the BOOT.

The BOOT

41. Prior to the WorkChoices amendments, all agreements had to pass the 'No Disadvantage Test' (NDT) to ensure that employees were no worse off under the agreement than they would be under the relevant award. The WorkChoices amendments removed the NDT requirement, later introducing a 'fairness test' in its place.
42. The BOOT requires FWA to be satisfied that *each individual employee* covered by the proposed enterprise agreement would be 'better off overall' when compared to the Award. This means that care needs to be taken to ensure that a trade off in one area doesn't expose particular employees on particular rosters or conditions to a disadvantage.
43. To a certain degree FWA has to rely on the statutory declarations made by the employer and the employees' bargaining representative that the proposed enterprise agreement does not disadvantage any employees.
44. FWA can also partly rely on the fact that the proposed enterprise agreement has been approved by the employees prior to its being lodged for final approval.

Once the proposed enterprise agreement has been approved

45. **Seven days** after the proposed enterprise agreement has been approved by FWA, it comes into operation.
46. The proposed enterprise agreement then continues in operation until it is either terminated according to the provisions in the Act, or it is replaced by a new proposed enterprise agreement. However, a new proposed enterprise agreement cannot replace an existing proposed enterprise agreement until after the nominal expiry date of the existing proposed enterprise agreement.
47. Usually the parties to a proposed enterprise agreement will commence negotiations for a replacement agreement a few months prior to the nominal expiry date of the existing proposed enterprise agreement. Depending on the circumstances, this can involve simply reaching agreement on the new rates of pay to apply during the term of the new proposed enterprise agreement, or it can involve major changes to terms and conditions to reflect changes in the business or external circumstances.

Summary

48. The important timeframes to be aware of when beginning the approval process are as follows:
 - (a) **Day 1** – The bargaining process is initiated (in this case we assume by virtue of the employer agreeing to bargain or otherwise initiating the bargaining process). The employer has 14 days in which to provide a Notice of Employee Representational rights to all employees.
 - (b) **Day 14** – Last day that the Notice of Employee Representational Rights must be provided to Employees.
 - (c) **Day 15** – *Assuming that the employer wishes to minimise the length of the enterprise agreement approval process*, a copy of the final proposed enterprise agreement, incorporating any changes arising from whatever consultation/negotiation takes place, must be provided to employees by this day for consideration. The Agreement must be explained to employees.
 - (d) **Day 23** – *Assuming that the Notice of Employee Representational Rights was provided on Day 1, and the final version of the proposed enterprise agreement was provided to employees on Day 15*, this is the earliest time that the employer can seek to have employees approve the proposed enterprise agreement assuming that all employees were provided with a Notice on Day 1. If this is not the case, the earliest time that the proposed enterprise agreement can be put to a vote is 21 clear days after the date that the last Notice was issued.
 - (e) **Day 37** – *Assuming that the proposed enterprise agreement is approved by employees on Day 23*, this is the last day that the proposed enterprise agreement can be lodged with FWA for final approval.
 - (f) **Date of approval** – once the proposed enterprise agreement is lodged, FWA will issue a Notice of Listing indicating what day it will consider the proposed enterprise agreement for final approval. If, in the opinion of FWA, the proposed enterprise agreement satisfies the relevant criteria for approval, it may be approved without the need for an appearance by the employer.
 - (g) **7 days after the date of approval** – the approved enterprise agreement comes into operation 7 days after the date that it is approved by FWA.
49. As you can see, on the absolute best case scenario, the approval process will take a minimum of around 7-8 weeks.

50. In our experience it is the process of providing a copy to employees, and seeking their feedback on the draft, that will take up most of the time. Also, arranging and coordinating a vote by the employees can take some time depending on the pattern of shifts worked by employees.
51. Once the proposed enterprise agreement has been approved (or made) by the employees, the process of having the proposed enterprise agreement approved by FWA will depend on the workload of the tribunal at the time. Generally, however, you can expect to have the proposed enterprise agreement approved within 4 weeks from the date of lodgement.

HWL Ebsworth

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**Enterprise Agreements and
Good Faith Bargaining:
Avoiding and Overcoming
the Typical Pitfalls**

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Introduction

Since the commencement of the *Fair Work Act 2009* (Cth) from 1 July 2009 all national system employers (that is, constitutional corporations) are under a statutory duty to bargain in good faith with parties involved in a proposed enterprise agreement.

These duties are a new concept for Australian employers and there can be significant detriments to any employer who fails to comply with them. Ignorance of the law is not a defence to a breach of these obligations.

In addition to Good Faith Bargaining, the Fair Work Act imposes particular requirements in relation to the enterprise agreement development and approval process.

This workshop will cover the following:

Topic 1 – An outline of the development and current status of enterprise bargaining and the statutory obligation of good faith bargaining;

Topic 2 – An overview of the principles of bargaining, behaviours, preparation and negotiation;

Topic 3 – Practical advice in relation to the operation of the enterprise bargaining and approval process and good faith bargaining requirements;

Topic 4 – A review of recent Fair Work Australia cases involving good faith bargaining and enterprise agreements.

Workshop Goal

The workshop is designed to demystify the good faith bargaining and enterprise agreement development process and the good faith bargaining requirements. It is designed to develop your skills in developing and executing strategies for achieving positive commercial outcomes through good faith bargaining and compliant, effective and sustainable enterprise agreements.

Topic 1

An outline of the development and current status of enterprise bargaining and the statutory obligation of good faith bargaining

ENTERPRISE AGREEMENTS

What is an enterprise agreement?

Enterprise agreements are agreements made at an enterprise level between employers and employees about terms and conditions of employment.

An enterprise agreement is made between one or more employers and:

- Employees; and
- in the case of greenfields agreements, one or more relevant employee organisations (unions).

Enterprise agreements can include a broad range of matters such as:

- rates of pay;
- employment conditions e.g. hours of work, meal breaks, overtime;
- consultative mechanisms;
- dispute resolution procedures; and
- deductions from wages for any purpose authorised by an employee.

They cannot, however, include unlawful content, such as discriminatory or objectionable terms.

The three types of enterprise agreements

Approval processes for enterprise agreements vary depending on the type of agreement. There are three types:

1. *Single-enterprise agreements*: involving a single employer or one or more employers, such as in a joint venture, co-operating in what is essentially a single enterprise, such employers are known as single interest employers.
2. *Multi-enterprise agreements*: involving two or more employers that are not all single interest employers.
3. *Greenfields agreements*: involving a genuinely new enterprise that one or more employers are establishing or propose to establish and who have not yet employed persons necessary for the normal conduct of the enterprise. Such agreements may be either a single-enterprise agreement or a multi-enterprise agreement.

ENTERPRISE BARGAINING

What is enterprise bargaining?

Enterprise bargaining is usually a formal process where the employer, employees and their representatives – such as unions – negotiate for an enterprise agreement that may provide for changes in the terms and conditions of employment applying to the enterprise. The end product is usually an enterprise agreement which sets out the terms and conditions of employment for employees covered by the agreement.

What are the requirements of good faith bargaining?

Each employee and employer who will be covered by a proposed enterprise agreement has the right to be represented by a bargaining representative, for example, a union, a committee of employee representatives or an employer organisation.

The parties and their bargaining representatives must meet the good faith bargaining requirements under the Act. The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

- attending, and participating in, meetings at reasonable times;
- disclosing relevant information, other than confidential or commercially sensitive information, in a timely manner;
- responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do *not* require a bargaining representative to:

- make concessions during bargaining for the agreement; or
- reach agreement on the terms that are to be included in the agreement.

The parties can agree to disagree. If the parties are unable to make an agreement, they may wish to leave the existing arrangements in place, ask Fair Work Australia (FWA) to help them reach an agreement or, in some cases, take protected industrial action.

There are also special provisions in the Act for FWA to help people in low-paid occupations bargain with their employers.

What are the advantages of 'best practice' enterprise bargaining?

Enterprise bargaining is a way of fostering a culture of change in the workplace and is a valuable tool in the process of continuous improvement. It can assist in the creation of responsive and flexible enterprises and help to improve productivity and efficiency. Increased productivity can provide higher wages to workers or more secure and satisfying work, higher profits to employers and lower priced goods and services to the public.

Employers and employees engaging in best practice enterprise bargaining work cooperatively and in good faith towards reaching an agreement that increases productivity and meets the needs of employees and employers. The parties view each other as equal partners in the negotiating process working towards this common goal.

Best practice enterprise bargaining can result in outcomes such as:

- more flexible hours and rosters;
- broader job classifications;
- new training and career opportunities;
- profit sharing or other forms of performance related pay;
- agreement to achieve efficiency gains such as new production targets or a reduction in waste;
- improved service delivery to achieve greater client satisfaction;
- family-friendly arrangements such as child care facilities, job sharing and career breaks, and
- improved procedures for handling employee grievances or consulting on workplace issues.

Cooperative enterprise bargaining can be rewarding and result in long term benefits for both the business and employees.

Topic 2

An overview of the principles of bargaining, behaviours, preparation and negotiation

1. Overview of the Principles of Bargaining

1. Traditional Bargaining

This is the typical way that enterprise agreement negotiations have been conducted in Australia. Participants are familiar with the process and while the outcome may not be certain, the series of events and behaviours leading to the conclusion of bargaining are predictable.

Rules of play:

- (a) Positions announced at the outset are not what the parties expect on settlement:
 - a. Both parties adopt extreme but not fixed “ambit” positions at the outset. Unions generally serve ambit log of claims and employers may adopt a status quo or concession approach.
 - b. Both parties are aware that the other has a negotiable position.
- (b) True bargaining positions and priorities are kept concealed from the other side
- (c) Arrival of a deadline motivates parties to settle
 - a. Parties do not make major concessions until right on the deadline and wait for this to occur before taking the initiative.
- (d) Outcomes determined by the relative power positions of the parties.
 - a. Conclusion reached as a result of concession arising out of a strike.
 - b. The union’s failure to garner support from the workforce results in back down.

Progress of bargaining

- (a) Early sessions:
 - a. Early meetings may be regular but generally brief and involved with fairly superficial items as parties not willing to make any concessions early on.
 - b. Adversarial room setup.
 - c. Fairly formal representative submissions made. The Union will generally talk of income and security concerns of members, management will generally raise profitability and productivity.
 - d. Parties generally spend time running through ambit claims and explaining positions without giving any indication other than rejection of the other sides proposals.

- (b) Middle sessions:
 - a. Parties more actively seek compromise
 - b. Sessions may last longer and be more productive
 - c. Some limited compromises may be agreed and areas where there is some flexibility will be exposed.
- (c) Closing rounds
 - a. Big ticket items become apparent.
 - b. Negotiations at this stage generally centre on one or two areas.
 - c. Meetings will be longer and more frequent.
 - d. Strike action may be threatened or occur
 - e. Legal action may occur
 - f. Bottom line offers are exposed and either rejected or settled.
 - g. Pay is generally the last item to be settled.
 - h. Formal terms are drafted and settled
 - i. Communication with workers occurs by both unions and employers
 - j. Unions will be keen to ensure solidarity and support from members during this period
 - k. Formal requirements of agreement to be met.

2. Interest Based or Win/Win Bargaining

This is the type of bargaining that the government is seeking to encourage through the introduction of the bargaining laws contained in the Act.

Key elements of interest-based bargaining include group problem solving, open communications, cooperation, trust and an emphasis on the mutual interests of participants. Requires sophisticated participants on both sides in order to be successful and would usually only occur where there is a history of the union and the employer working together to achieve results.

Advocates of interest based bargaining believe that outcomes achieved are superior to those obtained through traditional bargaining.

Rules of Play

- (a) The parties promote interests and not positions.
 - a. broad ranges of potential outcomes to concerns are discussed and proposed.
 - b. lack of outright bans or opposition.
- (b) The parties practice openness and not secrecy.
 - a. Parties often work together to collect and identify relevant data and work from a common fact base.
 - b. Disclosure of material will go beyond statutory requirements

- c. No caucusing
- (c) Everyone participates
 - a. No chief spokespersons
- (d) Parties must avoid contests of power
 - a. strikes, lockouts etc have no place
- (e) Parties should avoid deadlines
 - a. Parties set agreed limits and time frames.
- (d) Parties must acknowledge their commitment to interest based bargaining at the outset.

Progress of Bargaining

- (a) Early meetings:
 - a. Non adversarial room set-up
 - b. All parties state commitment to process and agreement on structure and timeframe may be made.
 - c. Parties choose the subject matter for negotiation.
 - d. May involve brainstorming ideas and solutions.
- (b) Middle sessions:
 - a. Once agreement on bargaining topics is reached, problem solving begins.
 - b. Parties aim for ‘win-win’ outcomes.
 - c. Information will play important role.
 - d. Brainstorming and consensus decision making are key features.
- (c) Closing rounds
 - a. “win-win” outcomes are translated into concrete terms of agreement.
 - b. Where there are unresolved issues, parties may revert to traditional bargaining tactics.
 - c. May involve external facilitator to reach final agreement.
 - d. Workers are communicated with and formal requirements for agreement are met.

2. Behaviours, Preparation and Negotiation

Tips, Tricks and Tools for Traditional Bargaining

1. Who is in charge?

- a. Unions will generally want to take charge at the bargaining table, particularly in front of members and delegates.
- b. Management should allow a certain amount of “huff and puff” but try to avoid any grandstanding and the Union hijacking the agenda.
- c. Don't lose control of a meeting.
- d. Develop points clearly and concisely.
- e. Present a united front. Never allow your own side to be undermined or contradicted in front of the Union.
- f. Keep everyone focussed on your agenda.
- g. Prevent meetings from stagnating or getting bogged down. If an issue cannot be resolved move on.
- h. Maintain order. Decide beforehand who will direct proceedings and do not allow for distractions.
- i. Be courteous.

2. Using the Caucus

- a. Don't be afraid to break for discussions.
- b. If solidarity is breaking down on either side, call a halt for a caucus and re-group.
- c. Keep it short. Do not allow for distractions.
- d. Can be used to relieve tension.

3. Record Keeping

- a. Always keep excellent and accurate minutes.
- b. Agree beforehand on minute/note takers.
- c. Always record when potential cracks or contradictions appear in the Unions arguments.
- d. Always record concessions or contradictions.
- e. These minutes will become evidence in the event of bargaining orders or industrial action so ensure they are contemporaneous, accurate and readable.

4. Powers of persuasion

- a. Develop your arguments in advance in support of proposals or rejection of proposals made by the union.
- b. Have documents or supporting evidence where appropriate to support or justify your position.
- c. Careful with making threats if they are just bluff. Threats will be repeated to employees and blown out of proportion. They will also be used as a basis for protected action ballots or other bargaining orders. If the threat is all bluff, it will undermine the Company's credibility.
- d. Where there is a serious consequence involved in a position taken by the Union, be clear and direct about that consequence – provide evidence where available and be sincere.
- e. Never make final commitments on an issue unless you intend to stick to it.
- f. Delivery of a message is important. The tone of voice and language used will convey sincerity or otherwise as well as depth of Company opposition to an issue.
- g. Use repetition. If you keep coming back to a topic time after time you may find that the Union's position will gradually change over time.
- h. Take account of body language. Opposition and hostility are indicated by crossed arms, infrequent eye contact, turning away, finger pointing. Interest and cooperation are indicated by body leaning forward, head tilting, eye contact and removing physical barriers. Shifting in chairs and fidgeting may indicate someone who is not being truthful.

5. Offers and Concessions

- a. Listen carefully to offers and proposals. Ask a lot of questions and carefully clarify each position put forward by the Union. Force them to answer questions on the detail of any concession.
- b. Where the answer to a proposal or offer is an outright "no" – ask why? Ask for alternative considerations.
- c. Where the response is a conditional rejection of a proposal bed down the details of the area of agreement before moving to the controversial area. Try to gain a clear, concrete statement of position from the Union.
- d. Where an offer or specific proposal is made do not reject it out of hand but ensure you have all the details before stating that you will need time to consider it. You should always do this even where you know that it will eventually be rejected by the Company.
- e. Know in advance where the bottom line is on all issues.
- f. Where concessions are to be made, be strategic about the timing of those concessions and the manner in which they are communicated.
- g. Know in advance the areas you are going to concede and space them out – do not make all concessions too early.
- h. Anticipate the areas in which the Union is going to find it difficult to compromise and try to devise alternate solutions.

- i. Don't lose patience and concede too early.
- j. Never make a concession on a position put forward in a previous meeting unless the position of the other side is sought first. The position of the Union may have changed between meetings.
- k. Always propose reciprocity in concession making.
- l. Hold back on important issues and don't be afraid of brinkmanship on big ticket items. You do not always know how far the other side is prepared to go.
- m. Always understand that sometimes it will be important to give the Union a "win" to communicate in order to gain an important concession.
- n. Be creative. Think outside the square on proposals and concessions. Don't be afraid to counter new suggestions to breach an impasse.
- o. Sometimes private "side" meetings between key representatives can broker an outcome over important issues. This gives you a chance to demonstrate sincerity and trust over issues where there can be no movement.
- p. Remember that sometimes bargaining fatigue can bring haggling to an end.
- q. Revisit proposals toward the end – this may elicit a different response.

6. Reaching Agreement

- a. Confirm the status of agreement at the beginning of each meeting. This helps to hold the Union accountable to their previous positions and avoids going over old ground. Re-cap areas of tentative agreement and areas where there is still dispute.
- b. Settle on the scope of the agreement early. Decide whether it is to be an updated version of the old agreement or whether a whole new deal is proposed.
- c. Make sure that all agreed elements have been recorded to ensure ease of drafting.
- d. Repeatedly ask the Union to put all proposals on the table. It is often the case that after everything is agreed the Union puts forward controversial clauses for inclusion. Ensure this is rejected.
- e. Don't disagree for the sake of it.
- f. Don't run scared of strikes. Always be aware of the process and procedure that needs to be adhered to prior to protected industrial action occurring. Do not be afraid of using the law to assist.
- g. Ensure the provisions of the Act are strictly adhered to with respect to approval and drafting.

3. Preparation and Bargaining Checklist

Before Bargaining:

- Conduct a needs analysis with respect to workforce and agreement.
- Determine ideal scope, duration and purpose of agreement
- Identify key areas for change
- Do financial modelling to determine bottom line wage increases
- Do financial and operational modelling to determine flexibility trade-offs
- Canvass employee opinion or suggestions on future agreement and how the current arrangements are going.
- Research industry outcomes for bargaining and common demands or attitudes being demonstrated by industry unions.
- Communicate with employees.

Initiating Bargaining

- Send out Notice of Representational Rights to all subject employees.
- If relationship exists, speak to Union representatives.
- Depending on bargaining representative appointments, determine how, where and when meetings are to take place.
- If more than one Union is involved, ensure all are communicated with regarding meetings.
- Communicate with employees.
- Devise a strategy for the bargaining which includes consideration of all bargaining representatives and outcomes.
- Elect consultative committee if appropriate.
- Determine management roles and responsibilities.
- Arrange first meeting.

Bargaining

- Communicate with employees regularly
- Keep minutes and notes
- Keep documents which can be disclosed to the Union/s. Determine in advance which documents are commercial in confidence or privileged.
- Always seek advice regarding bargaining orders when negotiations do not progress.
- Set agendas and dates for future meetings.
- Agree in advance on the timing of mass meetings.

Agreement

- Draft agreement and send to Union for confirmation.
- Ensure it contains all compulsory clauses.
- Ensure it does not contain prohibited content.
- Seek advice on the content of agreement.
- Communicate with employees.
- Send agreement to all subject employees and keep a record of the date it was send.
- Send instructions in accordance with the Act.
- Conduct a ballot at least seven (7) days after the agreement was received by all employees. When in doubt, delay the vote.
- Keep evidence and records of the outcome of the ballot.
- Communicate with all bargaining representatives.
- Communicate with employees about the outcome of the vote.
- Get the agreement signed and dated by bargaining representatives.
- Fill in and lodge appropriate forms with FWA.
- Ensure bargaining representatives lodge appropriate forms with FWA.
- Attend hearing to seek certification.
- Seek advice

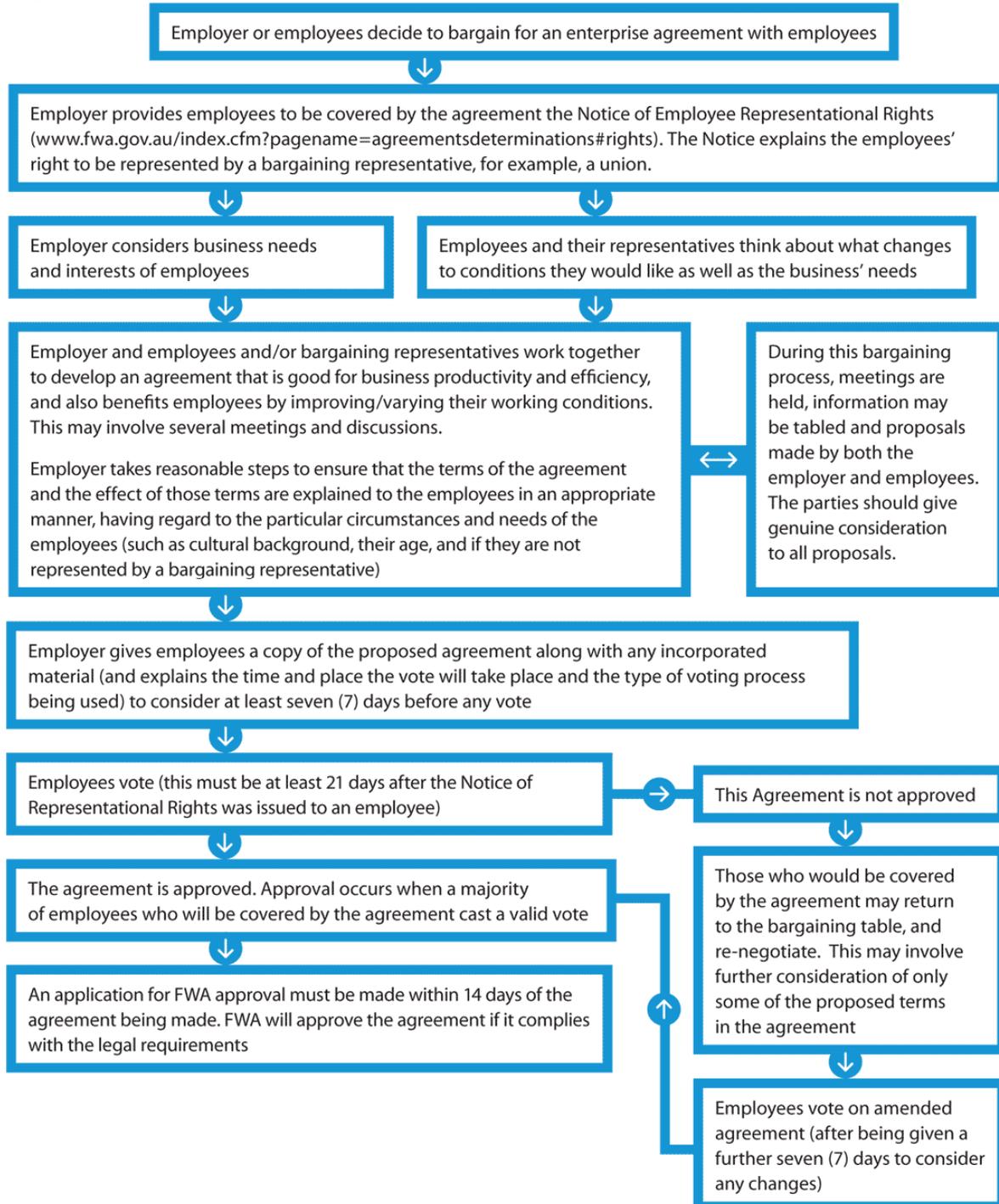
Topic 3

Practical advice in relation to the operation of the enterprise bargaining and approval process and good faith bargaining requirements

FLOWCHART – BARGAINING PROCESS FOR AN ENTERPRISE AGREEMENT



The process explained: An example of best practice bargaining



BARGAINING PROCESS FOR AN ENTERPRISE AGREEMENT

Bargaining is the process by which one or more employers and employees negotiate the terms and conditions which make an agreement. Either side may be represented in the process by a **bargaining representative**.

Notification Time

Bargaining on a proposed enterprise agreement begins when the employer agrees to bargaining or initiates bargaining, or when a majority support determination comes into operation, or a scope order comes into operation or a low-paid authorisation that specifies the employer comes into operation. This is known as the **notification time**.

Representation Rights

The employer must notify employees of the right to be represented as soon as practicable, and not later than **14 days**, after the notification time.

The notification should be given to each employee who will be covered by the agreement who is employed at the notification time.

This does not apply to a greenfields agreement as those employees to be covered by the agreement have not yet been employed.

Bargaining representatives

The following are bargaining representatives:

- an employer who would be covered by the agreement
- any union who has a member that would be covered by the agreement, unless the member has specified in writing that he or she does not wish to be represented by the union
- any union that has applied for a low paid authorisation that relates to the agreement
- any person specified in writing as their bargaining representative by either an employer or employee who would be covered by the agreement.

Good faith bargaining

As outlined in Topic 1, the parties and their bargaining representatives must meet the good faith bargaining requirements under the Act, including:

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner

- responding to proposals made by other bargaining representatives in a timely manner
- giving genuine consideration to the proposals made by other bargaining representatives, and reasons for any response to those proposals
- not behaving in a capricious or unfair way that undermines freedom of association or collective bargaining, and
- recognising and bargaining with the other bargaining representatives for the agreement.

Meeting Good Faith Bargaining Obligations

1. Attending and participating in meetings at reasonable times
2. Disclosing relevant information, other than confidential or commercially sensitive information in a timely manner.
3. Responding to proposals made by other bargaining representatives in a timely manner
4. Giving genuine consideration to the proposals of other bargaining representatives and giving reasons for the responses to those proposals
5. Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
6. Recognising and bargaining with the other bargaining representatives for the agreement

WHAT HAPPENS IF A PARTY DOES NOT BARGAIN IN GOOD FAITH?

Bargaining disputes

A bargaining representative for a proposed enterprise agreement may apply to FWA for assistance in resolving a dispute in relation to the proposed agreement.

Bargaining orders

A bargaining representative may apply to FWA for a bargaining order in relation to the agreement if the bargaining representative has concerns that:

- one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements
- the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement.

Scope orders

A bargaining representative for a proposed single-enterprise agreement may apply to FWA for an order specifying the employer or employers, and the employees, who would be covered by the

proposed agreement. Factors to be taken into account by FWA in deciding whether to make a scope order include whether bargaining for the agreement is progressing efficiently or fairly and whether all appropriate employees would be covered by the agreement.

In determining whether the group of employees to be covered by the agreement have been fairly chosen, FWA must take into account whether the group is geographically, operationally or organisationally distinct.

Serious breach declarations

If a bargaining representative contravenes one or more bargaining orders FWA can make a serious breach declaration. The contraventions must be serious and sustained and have significantly undermined bargaining for the agreement. If a serious breach declaration is made FWA may resolve the dispute by making a bargaining related workplace determination.

Workplace determinations

In certain circumstances, FWA may make industrial action related workplace determinations, bargaining related workplace determinations, or low-paid workplace determinations. The factors that FWA must take into account in deciding which terms to include in a workplace determination include the following:

- the merits of the case
- the interests of the employers and employees
- how productivity might be improved in the enterprise or enterprises concerned
- the public interest
- the conduct of the bargaining representatives.

Low-paid workplace determinations

Bargaining representatives for a proposed agreement, or a union that is entitled to represent the industrial interests of an employee who performs work under the proposed agreement, may apply for a low-paid authorisation in relation to a proposed multi-enterprise agreement.

In deciding whether to make such an authorisation, FWA must take into account a range of factors, including whether doing so would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level.

If a low-paid authorisation is in place and one or more of those bargaining are unable to reach agreement, FWA may make a low-paid workplace determination.

Industrial action related workplace determinations

FWA must make an industrial action related workplace determination if:

- a termination of industrial action instrument is made
- the bargaining representatives for the agreement have not settled the matters that were at issue during bargaining after the end of the post-industrial action negotiating period.

Bargaining related workplace determinations

FWA must make a bargaining related workplace determination if:

- a serious breach declaration is made
- the bargaining representatives for the agreement have not settled the matters that were at issue during bargaining after the end of the post-declaration negotiating period.

Operation of workplace determinations

A workplace determination operates from the day on which it is made.

A workplace determination ceases to operate on the earlier of the following days:

- the day on which a termination of the determination comes into operation
- the day on which an enterprise agreement or another workplace determination that covers the employee in relation to the same employment comes into operation
- the day on which there is no employee to whom the agreement applies.

The Act applies to a workplace determination as if it were an enterprise agreement.

APPROVAL OF AN ENTERPRISE AGREEMENT

Pre-approval steps

Once bargaining is complete and a draft agreement has been made certain steps must be taken to ensure the agreement is valid.

The employer must ensure that:

1. the terms of the agreement, and the effect of those terms, are explained to the employees
2. the explanation is provided in an appropriate manner. For example, it must be appropriate for young employees or employees from culturally diverse backgrounds.

Employees must endorse the agreement by voting for it. A vote must not occur until at least **21 clear days** after the day on which employees were given notice of their representational rights.

During the **7 clear day** period before voting for the agreement, the employer must ensure employees are given a copy of:

1. the agreement
2. any other material incorporated by reference in the agreement.

The employer must also notify employees of:

1. the time and place at which the vote will occur
2. the voting method that will be used.

When a vote is successful

The agreement is made when:

- *Single-enterprise agreement that is not a greenfields agreement:* a majority of the employees of the employer, or each employer, who cast a valid vote endorse the agreement.
- *Multi-enterprise agreement that is not a greenfields agreement:* a majority of the employees of at least one of the employers, who cast a valid vote endorse the agreement.
- *Greenfields agreement:* it has been signed by each employer and each relevant employee organisation that the agreement covers.

Unlawful terms

Agreements should not include any unlawful content. This includes:

- a discriminatory term
- an objectionable term
- a term that confers an entitlement or remedy in relation to unfair dismissal before the employee has completed the minimum employment period
- a term that excludes, or modifies, the application of unfair dismissal provisions in a way that is detrimental to, or in relation to, a person
- a term that is inconsistent with the industrial action provisions
- a term that provides for an entitlement to right of entry
- a term that excludes the Australian Fair Pay and Conditions Standard or any part of it during the bridging period.

Applying for FWA approval

Once an enterprise agreement is made, a bargaining representative for the agreement must apply to FWA for approval of the agreement using **Forms F16—Application for approval of enterprise agreement** and **F17 - Employer's Declaration in Support of Application for Approval of Enterprise Agreement** (copies of which you will find in the *Workshop Materials* section of this folder).

The application must be lodged with FWA within **14 days** of the agreement being made or within such further period as FWA allows.

The application must be accompanied by:

1. a signed copy of the agreement
2. any declarations that are required by the FWA Rules or Regulations to accompany the application.

Considerations by FWA

To approve an enterprise agreement, FWA must be satisfied that:

1. the agreement has been made with the genuine agreement of those involved
2. the agreement passes the better off overall test and does not include any unlawful terms or designated outworker terms
3. the group of employees covered by the agreement was fairly chosen
4. the agreement specifies a date as its nominal expiry date (not more than four years after the date of FWA approval)
5. the agreement provides a dispute settlement procedure
6. the agreement includes a flexibility clause and a consultation clause.

Better off overall test (or 'BOOT')

Before approving an enterprise agreement, FWA must ensure the agreement or variation passes the better off overall test.

This test requires that each of the employees to be covered by the agreement is better off overall than under the relevant modern award.

Approval of an enterprise agreement with undertakings

FWA may approve an enterprise agreement that does not meet the requirements in the Act if satisfied that a written undertaking meets the concern.

FWA may only accept a written undertaking from an employer, after seeking the views of each bargaining representative and if satisfied that the effect of accepting the undertaking is not likely to:

- cause financial detriment to any employee
- result in substantial changes to the agreement.

VARIATION OF AN ENTERPRISE AGREEMENT

Enterprise agreements can be varied in two ways:

1. by agreement
2. to remove ambiguity or uncertainty.

Enterprise agreements: variation by agreement

Employers and employees may agree to vary an enterprise agreement, but such a variation has no effect unless it is approved by FWA.

An employer may request that the employees endorse the variation by voting for it.

To seek FWA approval of an enterprise agreement variation a person covered by the agreement must make an application using **Form F23** (a copy of which you will find in the *Workshop Materials* section of this folder).

The application must be accompanied by:

1. a signed copy of the variation
2. a copy of the agreement as proposed to be varied
3. any declarations that are required by the procedural rules to accompany the application.

It must be made:

- within 14 days of the variation being made
- within such further period as FWA allows.

Enterprise agreements: variation to remove ambiguity or uncertainty

Any of the parties to an enterprise agreement may apply to FWA for a variation of their agreement to remove ambiguity or uncertainty. To apply use **Form F23** (a copy of which you will find in the *Workshop Materials* section of this folder).

If the parties to an agreement do not agree about a proposed variation, FWA can help them resolve their differences but cannot arbitrate the dispute.

A variation operates from the day specified in the FWA decision to vary the agreement.

TERMINATION OF AN ENTERPRISE AGREEMENT

Enterprise agreements and agreement-based transitional instruments (agreements made before 1 July 2009) can be terminated in two ways:

1. by agreement
2. after the nominal expiry date.

Termination of enterprise agreements by agreement

Employers and employees may agree to terminate an enterprise agreement or an agreement-based transitional instrument. An employer may request that the employees endorse the termination by voting for it.

A termination of an enterprise agreement has no effect unless it is approved by FWA.

If a termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to FWA for approval of the termination using **Form F24** (a copy of which you will find in the *Workshop Materials* section of this folder).

The application must be accompanied by any declarations that are required by the procedural rules to accompany the application.

It must be made:

- within 14 days after the termination is agreed to
- within such further period as FWA allows.

Termination after nominal expiry date

If an enterprise agreement or agreement-based transitional instrument has passed its nominal expiry date, any of the parties to the agreement may apply to FWA for the termination of the agreement.

If an application for the termination of an enterprise agreement is made, FWA must terminate the agreement if:

- satisfied that it is not contrary to the public interest to do so
- it is considered appropriate to terminate the agreement.

The termination operates from the day specified in the FWA decision to terminate the agreement.

Topic 4

A review of recent FWA and court cases involving good faith bargaining and enterprise agreements

In an environment of increasing competition to retain staff and of increasing union influence, collective agreements are facing a significant resurgence and a growing number of organisations are involved in discussions with their staff in relation to entering into such agreements.

The strict procedural and content requirements involved in relation to good faith bargaining and collective agreements mean that your business is more likely than ever to need assistance in relation to collective bargaining.

- In the matter of *National Union of Workers v Patties Foods Ltd [2011] FWA 4103 (1 July 2011)* it was found that the employer did not breach good faith bargaining requirements when it told employee-appointed bargaining representatives they had no obligation to respond to a union letter seeking their contact details and logs of claim.
- In the matter of *Sergeant Richard Bowers v Victoria Police [2011] FWA 2862 (13 May 2011)* it was held that the duty to bargain in good faith does not extend to a duty to pay bargaining agents.
- *In the case of MFCT Pty Ltd as trustee for Mildura Fruit Company Trust t/a Mildura Fruit Company (MFC) [2011] FWA 2024 (12 April 2011)* a collective agreement was rejected on the grounds that the employer had not taken all reasonable steps to provide each affected employee with a copy of the agreement (as opposed to merely providing access).
- In the case of *Newlands Coal Surface Operations (CFMEU v Senior Deputy President Hamberger, Deputy President McCarthy, Commissioner Blair of Fair Work Australia and Newlands Coal Pty Ltd)*, an agreement previously approved by FWA containing a “carve-out” provision was quashed by the Federal Court.
- In the case of *Capricornia Pty Ltd t/a Quality Hotel Batman's Hill on Collins [2011] FWA 727 (10 February 2011)*, FWA rejected a collective agreement on grounds that included the effect of the content of a single incorrect memo.
- Another in which a collective agreement was rejected because of a minor inconsistency in an undertaking in relation to protective clothing; *D H Gibson Pty Limited [2011] FWA 911 (10 February 2011)* illustrates the importance of taking a pro-active and comprehensive approach to drafting and negotiating collective agreements.
- The inclusion of a post employment restraint of trade provision in an enterprise agreement (which FWA said was of a type more usually included in a common law contract) was a basis

for rejection of the agreement in *Glen Eden Thoroughbreds T/A Ray White* [2010] FWA 72717 (10 September 2010).

- In *Lutanda Children's Services* [2010] FWA 7247 (24 September 2010), FWA rejected a proposed collective agreement that linked pay rises to changes in minimum award rates on the basis that such an agreement did not pass the Better Off Overall Test (BOOT).
- Many employers have also faced significant difficulties in having their collective agreements approved where they have attempted to include in them provisions regarding the cashing out of annual leave (decisions in *Armacell Australia*, *Direct Paper Supplies* and *Downer EDI Works*).

How HWL Ebsworth's Workplace Relations and Safety team can assist your business

At HWL Ebsworth, we provide expert legal and commercial advice to employers from a diverse range of industries.

Our workplace relations and safety practice is focused on achieving results that reflect the business needs and strategic goals of our clients. We understand that in the workplace, the right outcomes require more than just strict 'legal' advice. We see ourselves as partnering our clients in achieving legal compliance, strong business performance and the fostering of harmonious workplace relationships.

This means our service is proactive and dynamic, recognising the need to respond to issues immediately and to advise clients on a same day basis. Our lawyers do not distance themselves from our clients' businesses but actively visit sites to gain a better understanding of the industry and the enterprise. Our partners are available around the clock when urgent assistance is required.

We take a long-term and strategic approach to workplace relations. We ensure that our clients are aware of potential traps and hazards and are focused on long-term objectives, not just putting out fires. We also provide updates on proposed changes in legislation and court decisions that may impact on our clients' businesses or industry. This means our clients can stay ahead of the game in managing their workplaces.

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